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COURT OF CRIMINAL APPEALS
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No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/29/2020
DEANA WILLIAMSON, CLERK

TERRY MARTIN, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Lubbock County, Trial Cause 2019-494,736
No. 07-19-00082-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Terry Martin.

* The trial judge was Hon. Drue Farmer, Presiding Judge of County Court at Law No. 2, Lubbock County, Texas.

* Counsel for Appellant at trial was Ruth Cantrell, Ruth Cantrell Law Office, 1106 6th Street, Lubbock, Texas 79424 .

* Counsel for Appellant on appeal was Lorna McMillion, McMillion Law, PLLC, 1217 Avenue K, Lubbock, Texas 79401.

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* Counsel for the State before the Court of Appeals was Jeffrey Ford, Assistant Criminal District Attorney, P.O. Box 10536, Lubbock, Texas 79408.

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TO THE COURT OF CRIMINAL APPEALS

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Appeal from Lubbock County, Trial Cause 2019-494,736
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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Texans can generally carry a handgun while travelling—but not if you are a gang member. That is a crime. The plain language of the statute requires membership in a group that regularly associates to commit crime. Does this require, as the court of appeals held, proof of the defendant's personal commission of gang crimes?

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

Appellant was charged by information with unlawful carrying a weapon (UCW) by a criminal street gang member under TEX. PENAL CODE § 46.02(a-1)(2)(C).[1] A jury convicted him and assessed a $400 fine.[2] On appeal, he argued § 46.02(a-1)(2)(C) was unconstitutional and the evidence was insufficient.[3] The court of appeals held the constitutional complaints were not preserved, agreed the evidence was insufficient, and rendered a judgment of acquittal.[4]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its unpublished opinion on September 28, 2020. No motion for rehearing was filed. This petition is due by October 28, 2020.

GROUND FOR REVIEW

> Does unlawful carrying a weapon by a gang member, TEX. PENAL CODE § 46.02(a-1)(2)(C), require proof the defendant was continuously or regularly committing gang crimes?

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[1] CR 14.
[2] CR 65, 70.
[3] App. COA Brief at 3-4.
[4] *Martin v. State*, No. 07-19-00082-CR, 2020 WL 5790424, *4 (Tex. App.—Amarillo, Sept. 28, 2020) (not designated for publication).

STATUTES AT ISSUE

TEX. PENAL CODE § 46.02(a-1) makes it an offense to:

> intentionally, knowingly, or recklessly carr[y] on or about [one's] person a handgun in a motor vehicle…that is…under the person's control at any time in which:
> ….
> (2) the person is:
> ….
> (C) a member of a criminal street gang, as defined by Section 71.01.

TEX. PENAL CODE § 71.01(d) defines a "criminal street gang" as:

> three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

"Member" is not defined.

ARGUMENT

Background

Corporal Macias observed Appellant commit traffic violations on his motorcycle and pulled him over.[5] Appellant was wearing Cossack Motorcycle Club garb and admitted to being a member.[6] He also had a handgun with him.[7] He was arrested and charged with UCW by a gang member.[8]

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[5] 3 RR 14-15.
[6] 3 RR 16, 21, 29, 86.
[7] 3 RR 21, 23.
[8] CR 8, 14.

At trial, Appellant admitted he was a Cossack, had been a member for four years, and had previously been a Sergeant at Arms.[9] In that role, Appellant would have guarded the chapter president and enforced discipline among members.[10] Appellant was arrested at the Cossack's 2015 turf-war gunfight with the Bandidos at the Waco Twin Peaks restaurant.[11] That charge was later dismissed.[12]

The contested issue at trial was whether the Cossacks "continuously and regularly associate in the commission of criminal activities" so as to constitute a criminal street gang.[13] The focus of the State's evidence was on the Cossacks' activities generally. In addition to testimony about the Twin Peaks shooting,[14] the State's motorcycle-gang expert testified that the organization's "primary activities" were assaults, threats of violence, intimidation, and illegal firearms possession.[15] He also testified about a conviction by a Texas member for aggravated assault[16] and

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[9] 4 RR 23, 38, 44; 5 RR 15.
[10] 3 RR 76-77.
[11] 3 RR 139.
[12] 3 RR 145-46; 4 RR 26.
[13] 5 RR 35, 40 (defense argument); TEX. PENAL CODE §§ 46.02(a-1)(2)(C), 71.01(d).
[14] 3 RR 69-70, 91-92.
[15] 3 RR 72-73.
[16] 3 RR 99, 129.

reports to local police of Cossacks involved in assaults.[17] Appellant was convicted of gang-member UCW and fined.

Ex parte Flores

In support of his sufficiency challenge, Appellant relied on an overbreadth and vagueness decision from the Fourteenth Court of Appeals—*Ex parte Flores*.[18] That decision interpreted the criminal street gang definition and rejected the idea that it could be read like this:

> Three or more persons having [either]
>
> - a common identifying sign or symbol OR
> - an identifiable leadership who continuously or regularly associate in the commission of criminal activities.[19]

In other words, merely having a common identifiable symbol among three people (like the Boy Scouts) was not enough to constitute a gang.[20]

Ex parte Flores also noted that while the phrase "who continuously or

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[17] 3 RR 119-22.

[18] App. First Amended COA Brief at 40-41 (citing *Ex parte Flores*, 483 S.W.3d 632 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)).

[19] *Ex parte Flores*, 483 S.W.3d at 643-44 (interpreting TEX. PENAL CODE § 71.01(d) (defining "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.")).

[20] *Id*. at 644.

regularly associate in the commission of criminal activities," could be read to modify only "leadership" since that is the phrase's nearest referent, the grammatical cues do not support this conclusion since leadership is a singular, collective noun that should ordinarily take the singular verb "associates."[21]

Even under that construction of the statute, Flores argued that the definition of "member" was overbroad because a member could be convicted even if he was uninvolved in or unaware of the gang's criminal activities.[22] In affirming Flores's conviction, *Ex parte Flores* rejected that premise:

> The term "member" in section 46.02(a-1)(2)(C) derives its content from the definition of "criminal street gang" contained in Section 71.01(d). Read together, these provisions indicate that a gang "member" must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities.[23]

The court of appeals's opinion

Relying on this construction, Appellant argued the evidence was insufficient. The court of appeals adopted *Ex parte Flores*'s interpretation and reversed

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[21] *Id*. at 644 n.6. Although a collective noun can take the plural form if the collective is acting as individuals (*i.e*., the jury are of different minds), the point of the larger phrase is that they are associating, not acting as individuals. *See* Wayne Schiess, "Collective Nouns: Singular or Plural?" (available online at https://sites.utexas.edu/legalwriting/2017/06/05/collective-nouns-singular-or-plural/).

[22] *Ex parte Flores*, 483 S.W.3d at 645.

[23] *Id*.

Appellant's conviction because it found the record "devoid of evidence…showing that [Appellant] associated in the commission of criminal activities."[24] It noted, "[t]he sole piece of evidence indicating that appellant was ever involved in criminal activity was the evidence of his presence at the Twin Peaks shooting."[25]

The *Ex parte Flores* interpretation is contrary to the plain language.

In determining what gang membership for UCW means, two basic requirements are clear from the text of §§ 46.02(a-1)(2)(C) and 71.01(d): (1) the defendant must be a member of the group and (2) the group, among other things, must continuously or regularly associate in the commission of crime. But in holding that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities," *Ex parte Flores* and the court of appeals collapse the two requirements into one. This is contrary to the plain language.

It also produces strange results. For one, it excludes the newly initiated, who would not qualify as members because their association isn't yet regular. Also, it is contrary to the nature of a criminal enterprise. Members commit crimes in the name

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[24] *Martin*, 2020 WL 5790424, at *4.
[25] *Id*.

of the organization. So even if the average gang member only randomly or sporadically participates in the support, planning, or execution of gang crimes, the gang as a whole still continuously or regularly associates in the commission of criminal activities.[26] Requiring that any individual's association in committing gang crimes be continuous or regular in order to be a "member" seems at odds with how gangs operate and pose a threat to society.

***Ex parte Flores* did not need to go that far for a constitutional statute.**

The collapsing-into-one interpretation is not required for the statute to be constitutional. *Ex parte Flores* was responding to the concern that a person could be convicted of UCW while being unaware of the gang's criminal nature.[27] That, however, is a problem of culpable mental state. It shouldn't be fixed with an interpretation that requires an additional actus reus. Although this Court has not yet construed what elements the intentional, knowing, or reckless mental state applies to for § 46.02(a-1)(2)(C), since gang membership is what makes traveling with a handgun illegal, the mental state may extend all the way to the kind of organization

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[26] *See* Wesley F. Harward, *A New Understanding of Gang Injunctions*, 90 NOTRE DAME L. REV. 1345, 1348 (2015) ("Many criminal street gangs have hundreds, if not thousands, of members. As is to be expected in organizations of that size, membership is constantly changing with new members joining the gang and other members leaving.").

[27] 483 S.W.3d at 645.

one has joined.[28]

This affects Organized Criminal Activity.

Ex parte Flores may have thought it was interpreting only UCW. After all, it expressly refers to § 46.02(a-1)(2)(C) as one of the two statutes it was "[r]eading together." Despite this, its interpretation would seem to apply equally to the organized crime offenses.

Section 71.02 criminalizes the commission or conspiracy to commit certain offenses "as a member of a criminal street gang."[29] Although gang-member UCW does not require that the gun toting be done "as" a member (it requires only that the defendant "is" a member), that is of no moment. The "as" in Engaging in Organized Criminal Activity just requires "proof that the defendant was acting 'in the role, capacity, or function of' a gang member at the time."[30] Otherwise, the member element is identical in both statutes.

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[28] *See State v. Ross*, 573 S.W.3d 817, 824 (Tex. Crim. App. 2019) ("'where otherwise innocent conduct becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances.'") (quoting *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)).

[29] TEX. PENAL CODE § 71.02(a); *Zuniga v. State*, 551 S.W.3d 729, 735 (Tex. Crim. App. 2018) (engaging in organized criminal activity as a criminal street gang member does not require "intent to establish, maintain, or participate" in a criminal street gang).

[30] *Zuniga*, 551 S.W.3d at 736.

The member element in Directing Activities of Criminal Street Gangs, § 71.023, is no different at all and criminalizes directing, financing, or supervising certain predicate offenses "by members of a criminal street gang."[31] So if qualifying as a "member" of a "criminal street gang" for UCW requires proof the member was one of the three or more regularly associating in the commission of crime, it should for the organized criminal activity offenses, too. Thus, the consequences of the court of appeals's interpretation extend beyond UCW.

Although *Ex parte Flores* was wrong, the court of appeals was more so.

In addressing the constitutionality of the statute in a pretrial writ, *Ex parte Flores* was not called on to apply what it meant for a member to "associate in the commission of criminal activities."[32] But the court of appeals was and went beyond it. When it applied *Ex parte Flores*'s interpretation, the court of appeals appears to have required direct participation in crime. The court of appeals did not analyze the significance of Appellant's four-year membership, monetary contributions from membership dues, or past leadership role. All of these things facilitate the Cossack's

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[31] TEX. PENAL CODE § 71.023(a).

[32] *Ex parte Flores*, 483 S.W.3d at 645-48 (rejecting claim that "member" is vague and within arbitrary discretion of law enforcement to determine because statute required a member to "continuously or regularly associate in the commission of criminal activities" but not explaining what such association in committing crimes means).

primary activities—that being committing assaults, according to the State's expert. But the court of appeals looked only to his presence at the Twin Peaks shooting, explaining that this was the "sole piece of evidence indicating that appellant was ever involved in criminal activity."[33] It was the only evidence he was physically and personally involved in a crime.

"Associate" is not defined by the statute. Webster's New Universal Unabridged Dictionary defines the intransitive verb as "to enter into union; unite" or "to keep company, as a comrade or intimate."[34] Merriam-Webster's first definition for the intransitive verb is "to come or be together as partners, friends, or companions."[35] So it may denote several members who physically come together to commit gang crimes.[36] While this interpretation would prevent a single perpetrator with financial backers or a fan club to constitute a gang (which may align with

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[33] *Martin*, 2020 WL 5790424, at *4.
[34] Webster's New Universal Unabridged Dictionary, p. 90 (1992).
[35] merriam-webster.com/dictionary/associate
[36] In continuous violence against the family, the Legislature used "persons whose relationship to or *association with* the defendant" to describe people that the defendant was dating or living in the same household with. TEX. PENAL CODE § 25.11(a); TEX. FAM. CODE §§ 71.0021, 71.005.

common understanding), it also would exclude financial or technology crimes (which may not).[37]

The alternative is that "associate in the commission of criminal activities" means assisting the gang's effort to commit crimes, as an accomplice or conspirator would.[38] This may be what *Ex parte Flores* had in mind, which explains why that court may have collapsed the requirements. After all, members are generally members (and remain so) because they aid in some form or fashion with the group's activities. This interpretation substantially overlaps with the requirement for "combination," *i.e.*, that participants "collaborate in carrying on criminal activities,"[39] and, having used different terminology, the Legislature is presumed to have meant something else.[40] But in this case, the definitions of "combination" and

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[37] *See* TEX. PENAL CODE § 71.02 (a)(6) (criminalizing the wholesale promotion of obscenity as a criminal street gang member or with intent to aid a combination); (8) (fraud), (10) (money laundering and insurance fraud), (18) (wiretapping), (19) (Tax Code offenses).
[38] *See* TEX. PENAL CODE § 7.02.
[39] TEX. PENAL CODE § 71.01(a).
[40] Antonin Scalia and Bryan Garner, "25. Presumption of Consistent Usage," READING LAW, p. 170 (2012) (describing logical basis of the canon: "where the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.").

"criminal street gang" are likely intended to parallel one another, since each is a path to commission of EOCA and punished the same.[41]

If "associate in the commission of criminal activities" in § 71.01(d) requires that three or more gang members regularly and physically come together in the commission of crime, *Ex parte Flores*'s collapsed interpretation does even more mischief. Perversely, the higher up in the organization that a defendant is, the more difficult it will be for the State to establish a day-to-day association with other members.[42] It would grant immunity to members who provided essential resources for the gang's operations but seldom associate with others. And it would compound the problem of prosecuting Directing Activities of Criminal Street Gangs since it would require proof that the members' contribution was regular and that their association was done in each other's presence.

This Court should step in, stop the trend begun by *Ex parte Flores* and worsened by the court of appeals, and return the gang-member element of UCW and Organized Criminal Activity to the plain language set out by the Legislature.

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[41] *See* TEX. PENAL CODE § 71.02; *Zuniga*, 551 S.W.3d at 735.

[42] In cases like *Medrano v. State*, where the defendant acted as treasurer and provided the weapons that killed the gang's victims, the proof may fail. *Medrano v. State*, No. AP-75,320, 2008 WL 5050076 (Tex. Crim. App. Nov. 26, 2008) (not designated for publication).

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals, and affirm Appellant's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,438 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 27th day of October 2020, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX
Court of Appeals's Opinion

2020 WL 5790424
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do not publish.
Court of Appeals of Texas, Amarillo.

Terry MARTIN, Appellant

v.

The STATE of Texas, Appellee

No. 07-19-00082-CR
|
September 28, 2020

On Appeal from the County Court at Law No. 2, Lubbock County, Texas, Trial Court No. 2019-494,736, Honorable Drue Farmer, Presiding

Attorneys and Law Firms

Lorna McMillion, for Appellant.

Jeffrey S. Ford, for Appellee.

Before QUINN, C.J., and PARKER and DOSS, JJ.

MEMORANDUM OPINION

Judy C. Parker, Justice

***1** Appellant Terry Martin appeals from his conviction for unlawfully carrying a weapon while "a member of a criminal street gang."[1] We reverse the judgment of the trial court.

1 *See* Tex. Penal Code Ann. § 46.02(a-1)(2)(C) (West Supp. 2019), § 71.01(d) (West 2011).

Background

Appellant was riding his motorcycle north of New Deal when he was stopped by Corporal Michael Macias of the Lubbock County Sheriff's Office. Officer Macias observed that the motorcycle was traveling faster than the posted speed limit, had a partially obscured license plate, and made an unsafe lane change. Officer Macias also noticed that appellant was wearing a vest, known as a "cut," that read "Cossacks MC," for Cossacks Motorcycle Club. When appellant pulled over, Officer Macias had him place his hands on his head and conducted a pat-down. He asked appellant if he had any firearms on him; appellant responded that he was carrying a pistol inside his vest. The officer placed appellant in handcuffs and, as he did so, queried, "I take it by your cut you're a Cossack?" Appellant answered, "Yes, sir." Officer Macias then informed appellant that the Cossacks are considered a criminal gang.

Following his arrest, appellant was charged with the offense of unlawfully carrying a weapon as a member of a criminal street gang. The jury found appellant guilty and assessed a fine of $400.

Discussion

Under section 46.02(a-1)(2)(C) of the Texas Penal Code, a person commits an offense if the person (1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun (2) in a motor vehicle or watercraft that is owned by the person or under the person's control (3) at any time in which the person is a member of a criminal street gang as defined by section 71.01 of the Texas Penal Code. Tex. Penal Code Ann. § 46.02(a-1)(2)(C). A criminal street gang is defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code Ann. § 71.01(d).

By this appeal, appellant challenges the constitutionality of this statutory framework, both facially and as applied to him. Additionally, appellant asserts that the evidence is insufficient to support his conviction.

Issue Nos. 1-7: Facial Challenges

In his first through seventh issues, appellant asserts that the statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is facially unconstitutional under the First, Second, and Fourteenth Amendments of the United States Constitution. Specifically, he argues that this framework is facially unconstitutional (1) under the Equal Protection Clause of the Fourteenth Amendment, (2) under the First and Fourteenth Amendments because it impairs the right of association, (3) under the First and Fourteenth Amendments because it authorizes state action based on the doctrine of guilt by association, (4) under the First and Fourteenth Amendments because it is overbroad, (5) under the Due Process Clause of the Fourteenth Amendment because it violates the right to travel, (6) under the Second and Fourteenth Amendments, and (7) under the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague. The State responds that appellant's facial constitutional challenges have not been preserved for appellate review because appellant did not raise any such challenges at the trial court level.

***2** Generally, constitutional challenges are forfeited by a defendant who fails to object before the trial court. *Curry v. State*, 910 S.W.2d 490, 496 & n.2 (Tex. Crim. App. 1995) (en banc). The Court of Criminal Appeals has held that a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009).

In this case, appellant did not make any objection at trial that the statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional. Following *Karenev*, we must conclude that appellant may not raise his facial constitutionality challenges at this stage of the proceedings. Appellant's first seven issues are overruled.

Issue Nos. 8-14: As-Applied Challenges

In his eighth through fourteenth issues, appellant argues that the statutory framework under sections 46.02(a-1)(2)(C) and 71.01(d) of the Texas Penal Code is unconstitutional as applied to him. Here, he contends the framework is unconstitutional as applied (1) under the Equal Protection Clause of the Fourteenth Amendment, (2) under the First and Fourteenth Amendments because it impairs his right of association, (3) under the First and Fourteenth Amendments because it authorizes state action against him based on the doctrine of guilt by association, (4) under the First and Fourteenth Amendments because it is overbroad, (5) under the Due Process Clause of the Fourteenth Amendment because it violates his right to travel, (6) under the Second and Fourteenth Amendments, and (7) under the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague. The State, again, responds that appellant failed to make timely and specific objections to the statutory framework, as applied to him, at the trial court level.

Like facial challenges, "as applied" constitutional challenges are subject to the preservation requirement and must be made at the trial court in order to preserve error. *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014). Because appellant made no specific, timely claim of unconstitutionality at trial, these issues have not been preserved for our review. Accordingly, appellant's eighth through fourteenth issues are overruled.

Issue No. 15: Sufficiency of the Evidence

In his final issue, appellant claims that the evidence is insufficient to show he was a member of a criminal street gang for purposes of the statute.

The standard that we apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under that standard, when assessing the sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912. The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimonies, and we will not usurp this role by substituting our judgment for that of the jury. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012).

***3** Under section 71.01(d), a criminal street gang is defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code Ann. § 71.01(d). In *Ex parte Flores*, the Fourteenth Court of Appeals held that, when read together, the provisions of section 71.01(d) and section 46.02(a-1)(2)(C) indicate that a gang member "must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d 632, 645 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (rejecting argument that a defendant need not be involved in or aware of gang's criminal activities). Appellant contends that no evidence showed he regularly engaged in criminal activity as one of the three persons described in the statute.

The evidence presented at trial included testimony from the arresting officer, Corporal Macias, who testified that he was aware, from his training and experience, that the Cossacks are a criminal street gang. In addition, the State presented testimony from Deputy Joshua Cisneros of the Lubbock County Sheriff's Office. Deputy Cisneros testified that he works in the street crimes unit, a part of the Texas Antigang Center, which works to disrupt the activity of criminal street gangs. He testified that he was familiar with the Cossacks and that they were a nationwide outlaw motorcycle gang. According to Deputy Cisneros, Cossacks are known to engage in criminal activities, namely assaults, threats of violence, intimidation, and illegal firearms possession.

Deputy Cisneros testified that law enforcement uses a statewide database known as TxGANG to identify and keep track of gang members. He explained that certain factors, which are set forth in the Texas Code of Criminal Procedure, are used to make a determination that someone is a gang member. Two of these, namely a judicial finding and a self-identification during a judicial proceeding, are standalone criterion, meaning an individual can be entered into the TxGANG system upon a showing of either one. A determination of gang membership can also be made if any two of the following criteria are met: a nonjudicial self-admission; identification by a reliable informant; a corroborated identification by an informant of unknown reliability; evidence the individual uses technology to recruit new members; evidence the individual uses street gang dress, hand signals, tattoos, or symbols; or evidence that the individual has been arrested with known gang members for an offense or conduct consistent with gang activity. Finally, a determination can be made if there is evidence of any one of the preceding factors plus evidence that the individual visited gang members while they were imprisoned and frequented known gang areas and associated with known gang members.

Deputy Cisneros expressed the opinion that appellant was a member of the Cossacks motorcycle gang because appellant made a nonjudicial self-admission to Corporal Macias and he was wearing the cut and the black and yellow colors of the Cossacks.

Moreover, appellant previously had been identified as a gang member and entered in the TxGANG database by two different agencies: the McLennan County Sheriff's Office, which relied on appellant's gang attire and detention with gang members on a gang-related offense, and DPS Communications in Waco, which relied on appellant's nonjudicial self-admission and his detention with gang members on a gang-related offense.

However, although Deputy Cisneros testified that Cossacks were engaged in continuous illegal activities in Lubbock, he admitted that he knew of no criminal charges filed against Cossacks in the area. He acknowledged that he could not prove the Cossacks' criminal activities, stating, "The only thing I do have is just intelligence."

***4** Appellant testified that he did not believe that Cossacks are a criminal street gang and that he has never been convicted of a felony or a misdemeanor, other than traffic violations. Appellant further testified regarding his detention with gang members, stating that in May of 2015, he was at the Twin Peaks restaurant in Waco where Cossacks and Bandidos had gathered for a meeting. A shootout involving Cossacks, Bandidos, and law enforcement erupted, resulting in nine deaths. Appellant did not have a weapon on his person, although he had one in his vehicle. He was arrested and detained, along with some 170 others who were present, and charged with criminal organization. The charges against him were later dismissed.

In this appeal, appellant argues:

> The only evidence that Appellant had ever been entangled with law enforcement in any way was a report showing the Waco Police Department arrested Appellant in McLennan County for the engaging in organized crime in 2015. These charges were dismissed. A later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun. The Waco Police Department returned Appellant's gun to him. Other than this police report, the State introduced no evidence of any prior conviction or criminal activity involving Appellant. Appellant, in fact, had no criminal record.

Appellant concludes that this evidence is insufficient to show that he himself regularly or continuously engaged in criminal activity pursuant to his membership in a gang and that, consequently, he does not come within the purview of 71.01(d) or section 46.02(a-1)(2)(C) of the Texas Penal Code.

We agree with appellant. To be a gang member for purposes of prosecution under the statute, "an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership *and must also* continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d at 648 (emphasis added). While the evidence establishes the first half of the equation, i.e., appellant's membership as a Cossack, the record is devoid of evidence of the second half, i.e., a showing that he associated in the commission of criminal activities. Under *Ex parte Flores*, both gang membership and a connection to criminal conduct are required. *See id.*

The State claims that appellant "was not only aware of the criminal activity occurring within the Cossacks Outlaw Motorcycle Gang, but was an active participant in the illegal activity—particularly assaults and threats of violence." Tellingly, this assertion is made with no citation to the record, and in our review of the evidence, we find no support for the State's claim. The sole piece of evidence indicating that appellant was ever involved in criminal activity was the evidence of his presence at the Twin Peaks shooting. This single arrest, on charges which were later dismissed, does not establish that appellant continuously or regularly associated in the commission of criminal activities.

On this record, we find the evidence was insufficient to allow the factfinder to find the essential elements of the crime beyond a reasonable doubt.

Conclusion

We overrule appellant's first fourteen issues because they have not been preserved for appellate review. We sustain appellant's fifteenth issue because we find that the jury's verdict was not supported by sufficient evidence. Having sustained appellant's fifteenth issue, we reverse the judgment of the trial court. We have considered whether reformation of the judgment to reflect a conviction for a lesser-included offense is appropriate. *See Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014). We see no lesser-included offense as to which the two questions outlined in *Thornton* can be answered in the affirmative. Accordingly, we render a judgment of acquittal. *See* Tex. R. App. P. 43.2(c), 43.3.

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